



Committee on Professional Ethics

Opinion #514 - 10/17/79 (39-79)

Topic: Independent professional judgment; appearance of impropriety.

Digest: Not proper to accept employment as counsel for conservator where attorney was guardian in conservatorship proceeding.

Code: EC 5-1;
DR 4-101(B), 9-101(B);
Canon 9.

QUESTION

May a lawyer who served as guardian ad litem in a conservatorship proceeding, a few days after the conclusion of the proceeding, accept employment as counsel for the conservator?

OPINION

As guardian ad litem, an attorney assumes a special trust. While representing a client, he is also acting as an arm of the court. A guardian serves by virtue of judicial appointment, derives his powers from the court, and must account to the court.

In conservatorship proceedings, there are of course many decisions to be made as to what would best serve the interests of the proposed conservatee, and in reaching such decisions the court looks to the investigation and conclusions of the guardian ad litem. The need for appointment of a conservator and evaluation of persons who might serve are but two examples of matters of judgment and discretion as to which the report of the guardian ad litem would be of singular importance in the decisions reached by the court. Particularly since he is discharging what is essentially a quasi-judicial or public function, the attorney must be free of all personal influences (EC 5-1), and must avoid even the appearance of impropriety. DR 9-101(B).

As guardian ad litem, an attorney is in a position where there is a very real risk of influence by the prospect of future employment. Cf., Armstrong v. McAlpin, _____ F.2d _____ (2d Cir. 1979). In reporting on the need for the appointment of a conservator and reviewing the qualifications of particular candidates, the guardian can obviously enhance his own opportunities for later employment. This risk, and the appearance to the public that the guardian may have in mind feathering his own nest, make it improper for an attorney who has served as guardian to accept private employment as counsel to the conservator. The appearance of impropriety is heightened in the present inquiry by the fact that the proffered retainer follows

so closely upon the conclusion of the conservatorship proceeding.

In view of the conclusion reached under Canon 9, we do not address the additional concerns which might be raised by the proposed employment, such as (1) the possibility of an actual conflict of interest if the court's decision in the proceeding remains subject to modification, and (2) the possibility that the proposed representation might threaten disclosure of confidences and secrets in violation of DR 4-101(B).

For the reasons stated, the question posed is answered in the negative.
